Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN MURRAY, a/k/a John Costa,
by his mother and next friend,
JOANNE MILLER,

Petitioner,

v

FORD THOMPSON, Secretary,
Department of Public Welfare,
and his predecessors,
Commonwealth of Pennsylvania;
KAREN SCHNEIDER, Deputy Secretary
for Mental Health/Retardation,
and her predecessors,
Department of Public Welfare; and
ERIC M. BOST, Facility Director,
Western Center, and his predecessors,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the federal doctrine of equitable tolling applies in a civil rights action under 42 U.S.C.A. §1983 when a borrowed state statute of limitations does not toll the statute during periods of incompetency and following the state statute will defeat the goals of §1983 and effectively deprive a claimant, who is mentally incompetent and has no understanding of his cause of action, of any opportunity to seek redress for deprivations of his United States Constitutionally protected civil rights, and the strict adherence to the anti-tolling provision of the borrowed state statute of limitations contradicts all other state/territorial tolling provisions and therefore will violate the uniform application of statutes of limitations in civil rights cases.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit.

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OPINIONS BELOW

The January 29, 1996 Judgment Order of the Third Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is at No. 95-3311, is unpublished and is reprinted in the Appendix to this Petition at pp. A-13. The prior Memorandum Order of the Honorable Robert J. Cindrich of the United States District Court for the Western District of Pennsylvania, entered May 1, 1995 at No. 94-626, is unpublished and is reprinted in the Appendix to this Petition at pp. A-11. The prior March 30, 1995 Report and Recommendation of the United States Magistrate Judge Francis X. Caiazza for the United States District Court for the Western District of Pennsylvania at No. 94-626 is presently unpublished and is reprinted in the Appendix to this Petition at pp. A-2.

JURISDICTION

The Judgment Order of the Third Circuit Court of Appeals was entered on January 29, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action was filed pursuant to 42 U.S.C.A. §1983 on the basis that Petitioner was subjected to inhumane and abusive living conditions during his institutionalization at Western Center in Canonsburg, Pennsylvania, in violation of Title XIX of the Social Security Act, 42

U.S.C.A. §§1396, 1396a and 1396d, the Fourteenth Amendment of the United States Constitution and the Rehabilitation Act, 29 U.S.C.A. §794. The pertinent sections of these constitutional and statutory provisions are set forth in the Appendix at pp. A-15.

STATEMENT OF THE CASE

A. Statement of Facts

Western Center was a state-operated residential facility for persons with mental retardation which was located in Canonsburg, Pennsylvania. Western Center housed approximately 436 individuals, most of whom were over the age of 18. Most residents were placed at Western Center through court commitments because their families were unable to care for them in their natural homes and because no community alternatives were available. Many of the residents also had physical handicaps in addition to mental retardation.

John Murray, hereinafter referred to as Petitioner, was involuntarily committed to Western Center on January 22, 1980. Petitioner was committed to receive habilitation and treatment for his mental retardation, physical handicaps and seizure disorders. Petitioner resided in this institution for eleven years and was discharged on November 15, 1991. During Petitioner's institutionalization at Western Center, the facility operated under a provisional license as it had failed to maintain the applicable federal

standards for an institution of this type.

Respondents were unable to protect Petitioner from harm, and consistent neglect by the Western Center staff resulted in an unusually high accident rate. As a result, Petitioner was injured due to uncontrolled self-abusive behavior or by abuse of other residents and/or staff.

The underlying Complaint contains 215 detailed allegations relating to injuries suffered by Petitioner. For example, Petitioner was attacked and bitten on a number of different occasions by other residents. Petitioner suffered injuries to such areas as the arms, nose, ears, back, hands, abdomen and buttocks. These injuries were reported but no action was taken to correct this problem. Further, Petitioner exhibited an extreme and dangerous tendency for self-abusive behavior that was never controlled by the Western Center Staff. Petitioner received numerous injuries from banging his head on the wall and on chairs. He constantly poked at his eyes, and as a consequence of this behavior, he is permanently blinded. This was also reported by Western Center, but no action was taken to curb this conduct. In fact, the staff at Western Center would document this behavior quite often but then fail to take any remedial steps to prevent the quite dangerous and extreme self-abusive conduct of the Petitioner. An internal study by the Office of Mental Retardation concluded that, based on data for the period January-September 1988 when Petitioner was

a resident at Western Center, Western Center had the highest rate of reported abuse incidents, fractures and sutures among all state centers. Additionally, in October 1989 when Petitioner was a resident at Western Center, Respondents fired 22 employees of Western Center based upon allegations that they abused residents, and an additional 40 employees, including supervisors and professional staff, were notified that they faced disciplinary action related to, inter alia, abuse of residents and failure to report such abuse.

Petitioner contends that while he was a resident of Western Center, he was also subjected to excessive and dangerous restraints due to Respondents' failure to develop and implement effective behavior management programs. For example, during Petitioner's residency at Western Center, in a procedure known to the residents as "the rack", residents were strapped face down and spread-eagle on a bed, sometimes wearing helmets and facemasks that made breathing difficult.

Western Center's staff was deficient both in terms of quality and quantity of care. Despite well-documented and consistent staff shortages, Respondents failed to take the steps necessary to ensure that there were a sufficient number of staff members at Western Center to meet the needs of Petitioner. The staff was not adequately trained to address the needs of Petitioner in a competent manner. The lack of trained staff resulted in inadequate habilitation programs, as well

as inadequate medical and dental services for Petitioner. These inadequacies exacerbated the problem of abuse. Further, Petitioner was frequently subjected to verbal abuse and disrespect by Western Center staff.

Petitioner alleges that Respondents consistently failed to provide Petitioner with appropriate treatment. During Petitioner's residency at Western Center, the lack of treatment of the residents at Western Center was well documented since at least 1985 by the Pennsylvania Department of Health. Respondents failed to develop an adequate individual treatment program for Petitioner, and when such a program was developed, it was improperly implemented which resulted with Petitioner, in reality, having no program whatsoever. Due to this lack of treatment, Petitioner not only failed to learn new skills, but he also lost those skills which he possessed upon entering Western Center.

Residents at Western Center who had physical handicaps in addition to mental retardation, including Petitioner, were segregated from other residents of the facility. For example, Respondents maintained a separate unit solely for persons who used wheelchairs and a separate unit for blind residents.

Additionally, Petitioner contends that he was unnecessarily segregated from society as a whole. Petitioner rarely was taken outside the institution to enjoy community resources or to interact with

persons without disabilities. Respondents provided segregated services to Petitioner because of the nature and severity of his handicaps, and such services were not given in the most integrated setting appropriate to Petitioner's needs.

The living conditions at Western Center were also inadequate. For example, the temperature was rarely maintained at a comfortable level since the buildings tended to be excessively hot throughout the year, and in some living areas, there was an insufficient supply of hot water. Petitioner was afforded little privacy and spent an excessive amount of time indoors with little opportunity for exercise.

Petitioner was allegedly placed at Western Center because he required training and not because he presented a danger to others. Due to inadequate utilization reviews, insufficient discharge planning and the failure of Respondents to provide adequate community-based alternatives to Western Center, Petitioner remained institutionalized longer than was necessary.

Petitioner, in his underlying Complaint, contends that Respondents knew of the problems at Western Center at all times relevant to the Complaint due to personal observation, reports by Respondents' staff, reports by various state and federal agencies and information supplied by the Pennsylvania Protection and Advocacy, Inc., the Pennsylvania Association for Retarded Citizens, and the Association for Retarded Citizens--

Allegheny County.

At the time when Petitioner was involuntarily committed to Western Center on January 22, 1980, during his entire commitment, at the time of his discharge on November 15, 1991, at the time the underlying Complaint was filed on April 15, 1994, and at the present time, Petitioner has, at all times, remained incompetent and unable to comprehend the nature of his constitutional rights and the acts of Respondents which violated his constitutional rights. It was only when Petitioner's mother and next friend, Joanne Miller, obtained access to the records of Western Center on May 13, 1992 did someone who was willing and prepared to pursue Petitioner's rights discover that Petitioner's rights had been violated and the extent of that violation.

B. Procedural History

On April 15, 1994, Petitioner, through his mother and next friend, Joanne Miller, filed the underlying Complaint in the aforementioned matter under 42 U.S.C.A. §1983 on the basis that he was subjected to inhumane and abusive living conditions during his institutionalization at Western Center, in violation of Title XIX of the Social Security Act, 42 U.S.C.A. §1396 et. seq., the Fourteenth Amendment of the United States Constitution, and the Rehabilitation Act, 29 U.S.C.A. §794, invoking the jurisdiction of the District Court for the Western District of Pennsylvania pursuant to 28 U.S.C.A. §§1331 and 1334. On August

12, 1994, Respondents Thompson and Schneider filed a Motion to Dismiss with supporting Brief. Respondent Bost did not join in this Motion as effective service was not yet possible. District Judge Alan Bloch dismissed Respondent Bost, without prejudice, on September 27, 1994, for Petitioner's failure to make timely service. Upon Motion for Reconsideration, Judge Bloch vacated the September 27, 1994 Order and granted a Motion for an Extension of Time to effectuate service upon Respondent Bost. Service was then effected upon Respondent Bost and his Motion to Dismiss and Brief were filed on November 16, 1994.

After a transfer from Judge Bloch to District Judge Robert Cindrich, this matter was referred by Judge Cindrich to Magistrate Judge Caiazza for pretrial proceedings. Oral arguments before Magistrate Judge Caiazza occurred on December 8, 1994. On March 30, 1995, Magistrate Judge Caiazza entered a Report and Recommendation to Judge Cindrich that the Motions to Dismiss be granted based solely upon the Petitioner's alleged failure to satisfy the statute of limitations.

The Magistrate Judge ruled that, according to Pennsylvania law, "the statute of limitations runs against mentally incompetent individuals, irrespective of their disability." (Appendix pp. A-8). Further, the Magistrate Judge ruled that equitable tolling principles did not apply to the instant case because the injuries were

"either readily apparent or reasonably discoverable." (Appendix pp. A-9).

On April 17, 1995, Petitioner filed objections to Magistrate Judge Caiazza's Report and Recommendation. Respondents filed a response to Petitioner's objections on April 26, 1995. After a "de novo review of the pleadings and documents in the case, together with the Report and Recommendation and objections thereto", Judge Cindrich entered a Memorandum Order on May 1, 1995 which adopted Magistrate Judge Caiazza's Report and Recommendation as the Opinion of the Court and granted Respondents' Motions to Dismiss (Appendix pp. A-11). Petitioner then filed a timely Notice of Appeal on May 30, 1995. After considering the Briefs submitted by Petitioner and Respondents and the oral arguments, the United States Court of Appeals for the Third Circuit, on January 29, 1996, rendered a Judgment Order that affirmed the District Court's decision, "essentially for the reasons set forth in the District Court's Opinion."(Appendix pp. A-13).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted To Resolve An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Honorable Court.

A borrowed state Statute of Limitations for a federal civil rights action, pursuant to 42 USCA §1983, must be tolled in this case of egregious abuse

under the federal equitable tolling doctrines that are available to the Court, because in failing to do so, the Court will effectively deny incompetents any remedy for violation of their federal civil rights. This is a matter of first impression before this Honorable Court. However, this Honorable Court has previously stated that:

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law <u>if it is not inconsistent with federal law or policy to do so.</u> <u>Wilson v Garcia</u>, 471 U.S. 261, 266, 105 S.Ct. 1938 (1985) (emphasis added).

This Court has further held that "Courts are to apply state law <u>only if it is not 'inconsistent with the Constitution and laws of the United States.'</u>" <u>Garcia</u> at 268-271 (emphasis added). In addition, this Honorable Court has also held that,

> State legislatures do not devise their limitations periods with national interests in mind, and <u>it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.</u> <u>Occidental Life Insurance Co. v. EEOC</u>, 432 U.S. 355, 367 (1977) (emphasis

added).

Congress intended that "gaps in federal civil rights acts should be filled by state law," <u>Hardin v. Straub</u>, 490 U.S. 536, 538, 109 S.Ct. 1998, 2000 (1989), but only "as long as the law is not inconsistent with federal law" and does not defeat §1983's "chief goals of compensation and deterrence." <u>Id</u>. at 538-39, 109 S.Ct. at 2001. See also <u>Board of Regents v. Tomanio</u>, 446 U.S. 478, 64 L. Ed. 2d. 440, 100 S.Ct. 1790 (1980). The borrowed Pennsylvania statute of limitations contains an explicit provision which does not toll the statute during periods of incompetency, which tears at the very fabric of the federal policies underlying §1983 Civil Rights actions. Pennsylvania's statute provides that, "except as otherwise provided by statute, insanity or imprisonment does not extend the time" allowed by the statute for commencement of an action. 42 Pa.C.S.A. §5533(a). This explicit anti-tolling provision for incompetents will effectively deprive these persons of any right to redress deprivations of their constitutional and civil rights. In fact, application of the state law will deny Petitioner his federal claim.

Section 1983 was enacted to deter every person, acting under color of law, from violating the protected civil rights of others. In the present case, §1983 has been invoked to prevent the abuse of incompetents by state officials in state operated institutions. However, despite the national scope of §1983, it has no

application in Pennsylvania to deter and prevent the violation of the civil rights of incompetents. In Pennsylvania, an incompetent, who has no ability to comprehend that his civil rights have been violated, will never be able to seek redress for these violations. Unless an institutionalized incompetent miraculously regains his competency within the period of the statute of limitations, he will be forever barred from any federal remedy under §1983. Therefore, the deterrent effect of §1983 in Pennsylvania is basically nonexistent. It would be unconscionable for state employees to abuse and completely ignore the constitutional rights of the mentally incompetent residents who are entrusted to their care with no possibility of any legal accountability because they can hide behind the shield of a statute of limitations. The Court's failure to toll the statute will send a clear signal to state officials that they can commit wholesale violations of incompetents' civil rights with impunity. Rather than this signal, the Court should send an unmistakable message that the civil rights of incompetents will be protected by tolling the statute of limitations during the period of incompetency, for it is only by doing so that the civil rights of the incompetents will be preserved.

In addition to deterrence, the second federal policy underlying §1983 Civil Rights actions is compensation for the victim who has suffered a violation of his civil rights. In the present case, Petitioner has suffered permanent

blindness, frequent beatings, scars, bruises and other injuries. According to the federal policies underlying §1983, Petitioner should be compensated for suffering these constitutional deprivations. However, a strict application of Pennsylvania's anti-tolling provision prevents any action against those that violate incompetents' civil rights, and no incompetent will ever receive compensation for the deprivations committed against them if they remain incompetent to commence the action within the applicable statute of limitations. Petitioner was and remains mentally incompetent. He has no comprehension of his rights nor any way of understanding that his rights have been violated. If this Honorable Court does not toll the statute of limitations, the Petitioner will not only have suffered egregious abuse, but he will also be denied his federal rights under the United States Constitution. Pennsylvania's strict anti-tolling provision for incompetency clearly defeats §1983's chief goals of compensation and deterrence. This Honorable Court should not permit incompetents' federal civil rights to be so easily circumvented.

Pennsylvania is the only state/jurisdiction within the United States that explicitly does not toll its statute of limitations for incompetency or disability. Only two other jurisdictions, Connecticut and Puerto Rico, do not specifically address tolling due to incompetency in their respective statutes. All other jurisdictions have statutory

provisions which toll the statute of limitations in cases of incompetency or disability. (See Appendix at pp. A-18). Therefore, of all jurisdictions in the United States, only Pennsylvania deprives incompetents of any opportunity to vindicate their civil rights.

Pennsylvania's strict and unyielding statute of limitations effectively denies federal civil rights to incompetents and only serves to defeat the goals of §1983. It is incomprehensible that Congress would condone such an unconscionable deprivation. Generally, state tolling provisions further enhance federal interests. Neither Tomanio nor Hardin dealt with a situation in which a federal tolling doctrine was essential to the vindication of federal rights. Rather, these cases adopted state tolling provisions in situations where the tolling of the statute enhanced a federal right by tolling/expanding the time period within which to exercise a federal right. Petitioner is unaware of any decision where a federal court has adopted a tolling provision which effectively restricts or interferes with a federal right to the extent that the federal right becomes nonexistent. However, in the present case, Pennsylvania's explicit anti-tolling provision severely restricts/prohibits the exercise of a federal interest. A body of state tolling law that lacks a provision for equitable tolling is inconsistent with the provision of a complete federal remedy under §1983 and therefore should be overridden by the federal equitable tolling doctrine.

This Honorable Court may be able to justify the application of a non-tolling provision as it relates to claims arising under state law, but this Court should not condone such an inequitable result when it would effectively deny a person their Constitutional and Civil Rights under the United States Constitution. In effect, Pennsylvania's law implies that incompetents have no rights if they are so far removed from reality that they cannot determine when their cause of action accrues. This Honorable Court surely cannot agree that an incompetent, such as Petitioner, who has no comprehension of the nature of his civil rights but only knows the pain that he has suffered, should be denied his Constitutional and Civil Rights because he is incompetent. Therefore, this Honorable Court must grant Certiorari as a borrowed state limitations period is impermissibly interfering with the vindication of federal rights under §1983.

II.

Certiorari Should Be Granted To Guarantee A Uniform Application Of §1983 In Actions Involving Incompetents.

This Court has a well established tradition of protecting the uniform application of borrowed state statutes of limitations in §1983 actions. Wilson v. Garcia 471 U.S. 261, 275, 105 S.Ct. 1938, (1985), Carlson v. Green , 100 S.Ct. 1468, 64 L.Ed. 2d 15 (1980). According to the federal common law, federal courts apply the borrowed state statute of limitations for personal injury actions in a §1983 case. Wilson at 279. This system is

intended to guarantee the uniform application of such statutes of limitations. However, this uniformity is threatened by the differing state tolling provisions with regard to insane or incompetent individuals. This Honorable Court has stated,

> [The] federal courts may. . . fashion their own limitations periods whenever a state statute of limitations threatens a federal program's need for uniformity. Eubanks v. Clarke, 434 F.Supp. 1022, 1031 (E.D. Pa. 1977) citing United Auto Workers v. Hoosier-Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966).

In the present case, Petitioner is incompetent and always will be unable to comprehend the nature of his cause of action. He resides in Pennsylvania. Pennsylvania explicitly does not toll the statute of limitations for incompetents pursuant to 42 Pa.C.S.A. §5533(a). However, as indicated above, Pennsylvania is the only state in the United States that explicitly does not toll the statute of limitations for incompetency. Only two other jurisdictions, Connecticut and Puerto Rico, do not expressly address tolling due to incompetency in their respective statutes. All other jurisdictions have explicit statutory provisions which toll the statute of limitations during periods of incompetency or disability. (See appendix pp. A-18)

Of all jurisdictions in the United States, only Pennsylvania's anti-tolling provision is inconsistent with the goal of obtaining a complete federal remedy under §1983. If the Petitioner resided in any other state/jurisdiction, his ability to vindicate his civil rights would be protected during his incompetency. However, he resides in Pennsylvania where the civil rights of incompetents are endangered. The protection of incompetents' civil rights during periods of incompetency in all states/jurisdictions except Pennsylvania does not result in the uniform application of federal civil rights law and defeats §1983's chief goals of deterrence and compensation.

If the United States Supreme Court does not grant Certiorari, it will effectively deny Petitioner his Constitutional and Civil Rights. If the Petitioner had been institutionalized and subsequently abused in any other state/jurisdiction within the United States and suit was commenced within the same timeframe, the statute of limitations would be expressly or equitably tolled. However, because the cause of action arose in Pennsylvania, Petitioner will be deprived of his Federal civil rights. It is incomprehensible that the Court would refuse to exercise its federal equitable tolling powers to avoid this unjust result. Such an outcome would directly contradict the decision in Wilson v. Garcia, supra, where the Supreme Court of the United States quite clearly recognized the need for uniformity in statute of

limitations questions in dealing with §1983 actions. It is doubtful that the denial of an incompetent's federal right, depending on his physical location at the time his rights were violated, is a result which Congress intended when they mandated the broad sweep of §1983.

It is quite clear from the statutes of these states/territorial jurisdictions that an incompetent, such as Petitioner, would be permitted redress of his rights in court as the statute would be tolled during the period of mental disability. It is not equitable that residents of all other states/territorial jurisdictions who are similarly situated as Petitioner would be able to pursue their cause of action, while Petitioner's cause of action is jeopardized because the borrowed state statute does not have a tolling provision. The residents of any other state/territorial jurisdiction in the United States would have their federal rights vindicated, whereas in Pennsylvania, it would be permissible to flagrantly violate the rights of incompetents because they may never pursue a cause of action.

Petitioner contends that this Honorable Court should not condone such a blatant discrimination and the resulting lack of uniformity which would result by failing to equitably toll Pennsylvania's statute. In Wilson v. Garcia, supra, the Supreme Court sought to bring §1983 actions into a state of uniformity in the application of statutes of limitations. The Supreme Court, in determining how to

apply the state statutes of limitations, stated,

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. Wilson, at 266.

Further, the Supreme Court stated, "Courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.'" Wilson, at 266 (emphasis added).

It is quite clear from the opinion of this Honorable Court in Wilson, supra, that federal courts seek uniformity in the application of the borrowed state statutes of limitations. The Wilson, supra, Court determined that uniformity could be achieved by applying the state's personal injury statutes of limitations to all §1983 actions. However, this Honorable Court did not address the implications of incompetence tolling provisions of different states and their effect on federal rights. In effect, following one state's statute of limitations may deny the rights of an incompetent, where in another state, that same person's rights could be protected.

This Honorable Court should grant Certiorari to promote uniformity in the application of the borrowed state statutes of limitation. If the Petitioner appeared before this Court and his cause of action

arose in any other state/jurisdiction, the Court would toll the statute of limitations and the cause of action would proceed. However, solely because the Petitioner's cause of action arose in Pennsylvania, he is afforded no protection of his civil rights. Therefore, this Court should grant Certiorari to address this important issue.

III

Certiorari Should Be Granted To Resolve A Conflict Between United States Courts of Appeals On The Same Important Matter.

The Third Circuit Court of Appeals affirmed the decision of the Western District Court of Pennsylvania which adopted the opinion of Magistrate Judge Caiazza, and by doing so, failed to apply the federal doctrine of equitable tolling in Section 1983 Civil Rights Actions. As such, the Third Circuit decision directly conflicts with the decision of the Seventh Circuit Court of Appeals in Heck v. Humphrey, 997 F.2d 355 (7th Cir. 1993) cert. granted, -U.S.-, 114 S.Ct. 2364 (1994). In Heck, the Seventh Circuit recognized that,

> . . . the Supreme Court has held that state, not federal, tolling provisions apply to state statutes of limitations borrowed for Section 1983 suits.Heck at 358 (citing Tomanio and Hardin).

However, the Seventh Circuit determined that:

> Neither Tomanio nor Hardin, however, dealt with a situation in which a federal tolling doctrine was essential to the vindication of federal rights. Congress... intended that "gaps in federal civil rights acts should be filled by state law," Hardin v. Straub, supra, 490 U.S. at 538, 109 S.Ct. at 2000, but only "as long as that law is not inconsistent with federal law" and does not defeat section 1983's "chief goals of compensation and deterrence." Id. at 538-39, 109 S.Ct. at 2001...it follows that a body of state tolling law that lacks a provision for equitable tolling is inconsistent with the provision of a complete federal remedy under section 1983 and therefore is overridden by the federal doctrine. Heck at 358.

On Petition for Certiorari, the Supreme Court indicated that the Seventh Circuit Court of Appeals "concluded that a federal doctrine of equitable tolling would apply to the §1983 cause of action" under the facts of that case. Heck at S.Ct. 2373. The Supreme Court then stated that in reaching that decision, the Seventh Circuit Court of Appeals distinguished the Supreme Court cases holding that state, not federal, tolling provisions apply in §1983 actions. The Supreme Court did not indicate that the Seventh Circuit Court of Appeals was incorrect in applying the federal

equitable tolling principle or that it was improper to distinguish the Supreme Court decisions. Therefore, although only dicta, these comments by the Supreme Court could be interpreted in a manner which would recognize the application of the federal doctrine of equitable tolling in §1983 actions under the present circumstances. However, since this was dicta and not part of the holding of the case, the Supreme Court has not provided direct guidance on this issue, and therefore, the conflict between the Courts of Appeals continues to exist. Certiorari should be granted to resolve this conflict.

Also, there are conflicting opinions regarding the tolling of the Statute of Limitations for incompetents within the District Courts of the Third Circuit. For example, an opinion that is directly analogous to the present case is, Eubanks v. Clarke, 434 F. Supp. 1022 (E.D. Pa 1977). As in the present case, the Eubanks Court was faced with deciding whether mental incompetency in a §1983 action should toll the state statute of limitations. In holding that the state statute of limitations should be tolled, the Eubanks Court stated:

> the question is whether the borrowed state statute of limitations with no tolling provision effectively denies Eubanks a right created by federal law, i.e., the right to redress a violation of his constitutional rights under the Civil Rights Act.

Eubanks has been effectively denied a federal right if it is unreasonable (unfair) to expect a person with his disability to bring suit within the period provided by state law. We have found as a matter of law that it is unreasonable to expect Eubanks to have brought this suit while he was institutionalized. Eubanks, at 1033.

In support of this holding the Court further stated:

> It would be unconscionable to allow state employees who violated the civil rights of the involuntarily committed mental patients under their care to escape a federally created liability because the patients they victimize remain incompetent during the entire running of the period of limitations. Congress could not have intended that abused patients be denied redress under the federal civil rights laws. Eubanks, supra at 1032-133.

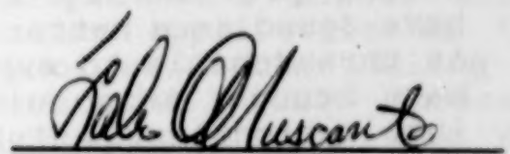
Eubanks presents a very persuasive argument for tolling the Pennsylvania statute. However, as the Supreme Court of the United States has never directly addressed this issue, not only is there a conflict between the Circuit Courts, but there is a conflict within the Third Circuit. Certiorari should be granted to resolve these conflicts.

CONCLUSION

For the foregoing reasons, Petitioner

respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,



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Date: APRIL 25, 1996

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN MURRAY. a/k/a John Costa, by his mother & next friend, JOANNE MILLER,	) Civil Action) No. 94-626
Plaintiff,	) Re: Doc.# 3)
v.	) JUDGE CINDRICH) MAGISTRATE) JUDGE CAIAZZA
FORD THOMPSON, Secretary, Department of Public Welfare, & his predecessors Commonwealth of PA, et al., Defendants.	)))))

MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

I.
RECOMMENDATION

It is recommended that the Motion to Dismiss filed by Ford Thompson and Karen Snider at document number three be granted. It is further recommended that the Motion to Dismiss filed by Eric M. Bost at document number twenty-nine be granted.

II.
REPORT

John Murray (Murray) filed this action pursuant to 42 U.S.C.A. §1983 on the basis that he was subjected to inhumane and abusive living conditions during his institutionalization at Western

Center in Canonsburg, Pennsylvania, in violation of title XIX of the Social Security Act, 42 U.S.C.A. §1396 et. seq., the Fourteenth Amendment of the United States Constitution, and the Rehabilitation Act, 29 U.S.C.A. §794.

A. Facts

Western Center was a public institution operated by the Pennsylvania Department of Public Welfare which received federal funds as an intermediate care facility for the mentally retarded. (Compl. at ¶¶ 10 and 17.) On January 22, 1980, Murray was involuntarily committed to Western Center to obtain adequate training for his mental retardation, physical handicaps and seizure disorders. (Compl. at ¶¶ 1,3, 10 and 13). He was over eighteen years of age at the time of his commitment. (Compl. at ¶ 1.) Murray was a resident of the institution for over eleven years, and was finally discharged from Western Center on November 15, 1991. (Compl. at ¶¶ 1 and 10.)

During Murray's institutionalization at Western Center, the facility operated under a provisional license because it had failed to meet applicable federal standards. (Compl. at ¶ 19.) Additionally, inspection reports from the Pennsylvania Department of Health and the United States Department of Health and Human Services evidence that Western Center was not in compliance with the requisite standards because its staff and physical environment were inadequate, and its services failed to provide active

treatment and community placement. (Compl. at ¶ 20.)

Based upon these government reports, information from the Pennsylvania Protection and Advocacy, Inc. and the Association for Retarded Citizens and records released by Western Center on May 13, 1992, Murray alleges the following: (1) that he endured harmful conditions, physical restraints and verbal abuse, and inadequate staffing (Compl. at ¶¶ 23-28, 29-32, and 33-36); (2) that Western Center failed to provide treatment, adequate living conditions, and community placement services (Compl. at ¶¶ 37-39, 40-46, and 47-48); and (3) that Western Center segregated its residents on the basis of their respective handicaps. (Compl. at ¶ 49-50).

The captioned defendants in this matter are Ford Thompson (Thompson), Karen Snider (Snider), and Eric Bost (Bost).[1] Thompson is the Deputy Secretary for Mental Health, and Snider is the Secretary of Public Welfare. (Defs.' Br. in Supp. of Mot. to Dismiss at 1 and 2.) Bost was the Director of Western Center. (Compl. at ¶ 9.) The Complaint also names as defendants the predecessors of the

[1]. The complaint misspelled Snider's name as Schneider. Additionally, the Complaint incorrectly identified Thompson as the Secretary of the Pennsylvania Department of Public Welfare, and Snider as the Deputy Secretary for Mental Health/Retardation.

captioned defendants, and all individuals who held the position of Deputy Secretary of Mental Health/Retardation. (Compl. at ¶¶ 7-9.)

B. Procedural History

Murray commenced this action by filing a Complaint April 15, 1994. (Doc. No. 1.) Counts I and II allege that in violation of title XIX of the Social Security Act, 42 U.S.C.A. §1396 et. seq., Western Center failed to maintain its facility in accordance with applicable standards, and to evaluate the appropriateness of Murray's continued placement. Counts III through VI allege that Western Center deprived Murray of his Fourteenth Amendment rights to treatment, protection from harm, freedom from undue restraint, and community placement. Count VII alleges discrimination under the Rehabilitation Act, 29 U.S.C.A. §794.

In response to Murray's complaint, Thompson and Snider filed a Motion to Dismiss and a brief in support of that motion on August 12, 1994. (Docs. No. 3 and 4.) An order of court signed by the United States District Judge Alan Bloch on September 27, 1994, initially dismissed Bost without prejudice pursuant to Fed. R. Civ. P. 4(m) for failure to make service within 120 days of filing the complaint. (Doc. No. 21.) Upon a Motion for Reconsideration, Judge Bloch vacated the September 27, 1994 order, and granted Murray an extension of time to effectuate service. (Doc. No. 25.) A summons was reissued for Thompson, Snider and Bost on

October 27, 1994, and Bost's return of service was executed on November 14, 1994. (Doc. No. 28.) Bost filed his Motion to Dismiss and a brief in support of that motion on November 16, 1994. (Docs. No. 29 and 30.)

This case is currently before the court on the defendants' respective motions to dismiss.

C. Legal Standard

When considering a Rule 12(b) (6) motion to dismiss, the issue is not whether plaintiff will prevail in the end, or whether recovery appears to be unlikely or even remote. The issue is limited to whether, when viewed in the light most favorable to plaintiff, and with all well pleaded factual allegations taken as true, does the complaint state any valid claim for relief. In this regard, the complaint will not be dismissed merely because plaintiff's factual allegations do not support the particular legal theory he advances. Rather, the court is under a duty to independently examine the complaint to determine if the factual allegations set forth could provide relief under any viable legal theory. 5A Wright & Miller, Federal Practice & Procedure: Civil 2d § 1357 n. 40. See also Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Moreover, even a defective complaint will not be dismissed unless it appears to a certainty that the defect in the complaint can not be cured by amendment. See, for example, Neitzke v. Williams, 490 U.S. 319 (1989).

D. Discussion

The defendants' motions to dismiss advance three bases for dismissing Murray's complaint: (1) statute of limitations; (2) qualified immunity, and (3) the Eleventh Amendment. Each argument will be evaluated in seriatim.

1. Statute of Limitations

Under the United Sates Supreme Court's holding in Wilson v. Garcia, 471 U.S. 261 (1985), claims filed under 42 U.S.C.A. §1983 are governed by the applicable state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 280 (1985). In Pennsylvania, the judicial code provides that the following actions must be commenced within two years:

> An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

42 Pa. Cons. Stats. Ann. §5524(2) (1982). Generally, the Pennsylvania statute "begins to run 'as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations.'" Bailey v. Lewis, 763 F. Supp. 802, 804, (E.D. Pa. 1991), quoting, Pocono International Raceway v. Pocono Produce, Inc., 503 Pa. 80, 84, 468 A.2d 468, 471 (1983).

The Pennsylvania judicial code also contains an objective reasonable person standard for determining the tolling of the statute of limitations. 42 Pa. Cons. Stat. Ann. §5533(a) (1984); Brunea v. Gustin, 775 F. Supp. 844, 847 (W.D. Pa. 1991). Tolling the statute of limitations on the basis of mental incompetency "interposes an impermissible subjective element into the reasonable person standard." Barren by Barren v. United States of America, 839 F.2d 987, 994 (3d Cir. 1988). Consequently, courts applying Pennsylvania law have consistently held that the statute of limitations runs against mentally incompetent individuals, irrespective of their disability. Bailey, 763 F. Supp. at 808; Brunea, 775 F. Supp. at 847, citations omitted.

In the case sub judice, Murray was discharged from Western Center on November 11, 1991. However, the Complaint which is currently before the court on the defendants' motions was not filed until April 15, 1994. Therefore, Murray initiated his action after the expiration of the two year limitations period under 42 Pa. Cons. Stat. Ann. §5524(2).

The bar under the two year statute of limitations is not altered by the allegation that Joanne Miller, Murray's mother and next friend, did not learn of his cause of action until Western Center released its records on May 13, 1992. (Compl. at ¶ 1.) Equitable principles such as the discovery rule will toll the statute of limitations only where the injury "is not readily discernable."

Stauffer v. Ebersole, 385 Pa. Super. 306, 309, 560 A.2d 816, 817, alloc. denied, 524 Pa. 622, 571 A.2d 384 (1989). Accordingly, the discovery rule is applied only in circumstances "in which no amount of vigilance would have enabled the plaintiff to discover the injury or its cause within the limitations period." Bailey, supra, at 807.

Here, each of the alleged injuries, viz. physical and verbal abuse, inadequate staff and living conditions, failure to provide treatment and community placement, and the segregation of residents by handicap, was either readily apparent or reasonably discoverable.[2]

E. Conclusion

Although the information which forms the basis of Murray's Complaint illustrates an egregious, shocking pattern of neglect and disregard for his most basic health and safety needs, the two year Pennsylvania statute of limitations bars him from seeking redress for his alleged injuries. Therefore, the court is compelled to grant the Motion to Dismiss filed by Thompson and Snider at document number three and the Motion to Dismiss filed by Bost at document number twenty-nine.

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[2] Given that Murray's action is barred by the statute of limitations, there is no need to evaluate the merits of the defendants' qualified immunity and Eleventh Amendment arguments.

In accordance with the Magistrates Act, 28 U.S.C. §636(b)(1)(B) and (C), and Rule 72. 1.4 (B) of the Local Rules for Magistrates, objections to this report and recommendations are due by April 17, 1995. Responses to objections are due by April 27, 1995.

/S/Francis X. Caiazza

Francis X. Caiazza
U.S. Magistrate Judge

Dated: March 30, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN MURRAY, et. al. Plaintiffs	)
	) Civil Action
	) No. 94-626
vs.	) Judge Cindrich
	) Magistrate Judge
	) Caiazza
FORD THOMPSON, et. al. Defendants	) Documents #3, 29

MEMORANDUM ORDER

On June 15, 1994, this case was referred to United States Magistrate Judge Francis X. Caiazza for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on March 30, 1995, recommended that the motion to dismiss by Ford Thompson and Karen Snider filed at document number three (#3) be granted and the motion to dismiss filed by Eric M. Bost at document twenty-nine (#29) be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties and objections were filed by the plaintiffs on April 17, 1995. After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 1st day of May, 1995;

IT IS HEREBY ORDERED that the motions to dismiss filed by defendants Ford Thompson and Karen Snider at document number three (#3) and by Eric M. Bost at document twenty-nine (#29) are GRANTED.

The report and recommendation of Magistrate Judge Caiazza, Document No.34, dated March 30, 1995, is adopted as the opinion of the Court.

/S/Robert J. Cindrich
Robert J. Cindrich
United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3311

JOHN MURRAY, a/k/a John Costs, by his mother and next friend, Joanne Miller
Appellant,

vs.

FORD THOMPSON, Secretary of Department of Public Welfare, and his predecessors, Commonwealth of Pennsylvania; KAREN SCHNEIDER, Deputy Secretary for Mental Health/Retardation, and her predecessors, Department of Public Welfare; ERIC M. BOST, Facility Director, Western Center, and his predecessors
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 94-00626)
District Judge:
Honorable Robert J. Cindrich

ARGUED January 25, 1996

BEFORE: STAPLETON, MANSMANN and LEWIS, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on May 2, 1995, be and is hereby AFFIRMED, essentially for the reasons set forth in the district court's opinion.

Costs taxed against the appellant.

BY THE COURT:

/S/Timothy K. Lewis
Circuit Judge

Attest:

/S/ P. Douglas Sisk
Clerk
Date: January 29, 1996

CONSTITUTIONAL AND STATUTORY PROVISIONS

A) Section 1 of the 14th Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B) 42 U.S.C.A. §1983:

Every person who, under color of any statute , ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

C) The Rehabilitation Act, 29 U.S.C.S. §794 (a):

Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 USCS § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

D) Title XIX of the Social Security Act, 42 USCA §1396a(a)(31):

(a)Contents. A State plan for medical assistance must...

(31) with respect to services in an intermediate care facility for the mentally retarded (where the State plan includes medical assistance for such services) provide

(A) with respect to each patient receiving such services, for a written plan of care, prior to admission to or authorization of benefits in such facility, in accordance with regulations of the Secretary, and for a regular program of independent professional review (including medical evaluation) which shall periodically review his need for such services;

(B) with respect to each intermediate care facility for the mentally retarded

within the State, for periodic onsite inspections of the care being provided to each person receiving medical assistance, by one or more independent professional review teams (composed of a physician or registered nurse and other appropriate health and social service personnel), including with respect to each such person (i) the adequacy of the services available to meet his current health needs and promote his maximum physical well-being, (ii) the necessity and desirability of his continued placement in the facility, and (iii) the feasibility of meeting his health care needs through alternative institutional or noninstitutional services; and

(C) for full reports to the State agency by each independent professional review team of the findings of each inspection under subparagraph (B), together with any recommendations;

CITATIONS TO STATE/TERRITORIAL INCOMPETENCY STATUTE OF LIMITATIONS TOLLING PROVISIONS

Alabama Statutes 6-2-8 [A]; Alaska Statutes 9.10.140; Arizona Statutes 12-502; Arkansas Statutes 16-56-116; California Statutes - West's Ann.Cal. CCP §352; Colorado Statutes 13-81-103; Delaware Statutes 10-8116; District of Columbia Statutes 12-302; Florida Statutes 95.051; Georgia Statutes 9-3-90; Hawaii Statutes 657-8; Idaho Statutes 5-230; Illinois Statutes 735-5/13-112,13-211; Indiana Statutes IC 34-1-2-5; Iowa Statutes 614.8, 614.19, 614.27; Kansas Statutes 60-515; Kentucky Statutes KRS 413.170; Louisiana OC 3468; Maine Statutes T. 14 §853; Maryland Statutes §5-201; Massachusetts Statutes C.260 §7; Michigan Statutes MCLA§600.5851, MSA §27A.5851; Minnesota Statutes 541.15; Mississippi Statutes 15-1-59; Missouri Statutes 516.030, 516.170; Montana Statutes 27-2-402; Nebraska Statutes 25-213; Nevada Statutes 11.250; New Hampshire Statutes C.508 §4,8; New Jersey Title 2A C.14 §21; New Mexico Statutes 37-1-10; New York Statutes C.P.L.R. §208; North Carolina Statutes 1-17, 1-19, 1-20; North Dakota Statutes 28-01-25; Ohio Statutes 2305-16; Oklahoma Statues 12 §96; Oregon Statutes 12.170, 12.160; Rhode Island Statutes 9-1-19; South Carolina Statutes 15-3-40, 15-3-50; South Dakota Statutes 15-2-22; Tennessee Statues 28-1-106; Texas Statutes CP&R 16.001; Utah Statutes 78-12-36; Vermont Statutes 12-551; Virginia Statutes 8.01-229; Virgin Islands 5-36; Washington Statutes 11.88; West Virginia Statutes

C.55 Art 2 §15; Wisconsin Statutes 893.18, 893.16; Wyoming Statutes 1-3-114.